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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CESAR PENA,

Defendant and Appellant.

D074050

(Super. Ct. No. JCF000544)

APPEAL from a judgment of the Superior Court of Imperial County, William D. Quan, Judge. Affirmed.

Patricia M. Ihara, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Junichi P. Semitsu, Deputy Attorneys General for Plaintiff and Respondent.

Cesar Pena pleaded no contest to a felony count of inflicting corporal injury on a spouse, cohabitant, or dating partner (Pen. Code, § 273.5).¹ He was granted three years of formal probation with imposed conditions, including a criminal protective order, barring him from contacting the victim. Pena's sole contention on appeal is that the no contact order violates his First Amendment right of association. He requests modification of the order to expressly allow the victim to initiate contact. We reject this contention and affirm the judgment.

BACKGROUND

As the factual basis for his no contest plea, Pena stipulated to the police report documenting the domestic violence incident involving his girlfriend, A.D. Early in the morning on January 1, 2018, police responded to a 911 call. The complainant observed Pena on the grounds of an apartment complex dragging A.D. by her hair and pushing her. Responding officers witnessed Pena "aggressively chasing" A.D., who was crying "hysterically" and "attempting to evade" Pena.

A.D. told police that she and Pena had been dating for several months and lived together. They argued at a New Year's party, and Pena grew more upset with her during the drive home when he twice struck her face with the back of his open hand. When they arrived home, A.D. grabbed the keys from Pena's hand. He grabbed her by her hair and began to pull her towards their apartment. She pushed him off, at which point he grabbed her and, with both hands around her neck, strangled her for approximately five seconds.

¹ Subsequent statutory references are to the Penal Code unless otherwise indicated.

A.D. began to yell for help. Pena stood behind her, placed his hand over her mouth, and covered her mouth for 30-60 seconds. She felt she could not breathe and began to panic. In his statement to the police, Pena denied strangling A.D. or pulling her hair. The police report indicated A.D. "had redness to her right and left side of her neck. None of the injuries required medical attention." Pena had no injuries.

A felony complaint charged Pena with inflicting corporal injury resulting in a traumatic condition on his girlfriend on January 1, 2018, in violation of section 273.5, subdivision (a). The court issued a criminal protective order (CPO) pursuant to section 136.2 prohibiting Pena from (1) having "personal, electronic, telephonic, or written contact" with A.D., (2) contacting A.D. "through a third party, except an attorney of record," and (3) coming "within 100 yards" of A.D.

In April, Pena pleaded no contest to the charge. He met with a probation officer who prepared a sentencing report. The probation officer's sentencing report reflects that Pena sustained a prior misdemeanor conviction for domestic violence (§ 273.5, subd. (a)) on February 24, 2015. The misdemeanor conviction resulted in Pena being placed on three years of summary probation and required Pena to perform community work services and to pay fines and fees. The probation officer's report reflects that Pena declined to make any statement to the probation officer regarding the current offense, but Pena denied any abusive behavior toward the victim. On this basis, the probation officer concluded that Pena "has not accepted responsibility for the abusive behavior." The probation officer declined to recommend modifying the CPO to a "good conduct" order

despite Pena and A.D.'s apparent mutual desire for permitted contact, and recommended imposing a no mutual contact order.

Prior to sentencing, A.D. filed a petition to modify the CPO, attesting under penalty of perjury "no [prior] physical or verbal abuse" occurred between her and Pena. She declared "there was no physical contact" during the charged incident and she "should have not said he did when it did not happen."

In May, Pena appeared in court for sentencing. He requested the court to refrain from entering a no mutual contact order and asked the court to enter a "good conduct" order instead. Pena expressly objected to "a stay-away order" on constitutional grounds.

In response, the prosecution argued that Pena was on probation for his prior misdemeanor conviction under section 273.5 with a different victim when this offense occurred and requested that the court enter "a complete stay-away order at least until the defendant has made some progress in anger management or there's a change in circumstance."

The trial court acknowledged the prior conviction and stated that, while it would not impose an order prohibiting mutual contact, it was not inclined to lift the previously imposed no contact order:

"[G]iven the nature and the circumstances of what occurred, I'm not inclined to modify the CPO at this time, nor—but I do agree with one thing . . . , I'm not going to make the no-mutual-contact-with-the-victim order [recommended in the probation officer's report]. I do believe that—I agree with your statement that the victim has a constitutional right also to association, and to restrict her ability, I think is inappropriate. The court has jurisdiction, I think, over the defendant and his rights to association, at least with regards to a victim, but I don't think the court would have authority over the

victim's right of contact, so I'm not going to order . . . no mutual contact."

A.D. then addressed the court in support of her request to modify the CPO to permit contact, stating she did not feel "intimidated" by Pena and that, if anything were to happen, she had "a backup plan." "I mean, his mom lives downstairs. I mean, like, I'm close with his family, and my parents know about it and so does his mother, and—and if anything were to happen, I could always go home with my parents" She explained she was currently living in the apartment, but Pena was living with a family member in another location.

The court indicated it would require Pena to attend an anger management course and again referenced the prior misdemeanor domestic violence conviction, stating, "I would suspect that there was already a 52-week anger management course." The court indicated it was not inclined to alter the no contact order until there was evidence of a change in circumstance that would justify modification of the initial terms. The court explained to A.D., "[T]his doesn't stop you from being able to file another petition to modify or that Mr. Pena can file another petition to modify the CPO once he's had some progress into this, but I'm not inclined—I don't think there has been a change enough for me to do that."

The trial court placed Pena on formal probation for three years, imposed various fines and fees, and imposed certain probation restrictions, including: "The defendant will have no contact with the victim. This will include communications personally or through a third party, whether verbal, written, or by nonverbal conduct." The court also issued a

CPO under section 1203.097 which, like the initial order issued under section 136.2, prohibited Pena from having "personal, electronic, telephonic, or written contact" with A.D., prohibited Pena from contacting A.D. "through a third party, except an attorney of record," and prohibited Pena from coming "within 100 yards" of A.D.

Pena's only contention on appeal is that the probation condition and protective order prohibiting him from contacting the victim are not sufficiently narrowly tailored and violate his First Amendment right to free association. He requests modification of the restrictions to expressly allow the victim to initiate contact "that is acceptable and welcomed by her."

DISCUSSION

A. Legal Principles

The criminal protective order was issued pursuant to section 1203.097, which provides in relevant part, "(a) If a person is granted probation for a crime in which the victim is a person defined in Section 6211 of the Family Code, the terms of probation *shall* include all of the following: [¶] (1) A minimum period of probation of 36 months, which may include a period of summary probation as appropriate. [¶] (2) A criminal court protective order protecting the victim from further acts of violence, threats, stalking, sexual abuse, and harassment, and, if appropriate, containing residence

exclusion or stay-away conditions."² (§ 1203.097, subd. (a)(1) & (2), italics added.) "In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to . . . section 1203.1." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121 (*Carbajal*).) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality' " (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*), superseded by statute on other grounds, *People v. Moran* (2016) 1 Cal.5th 398, 403, fn. 6 (*Moran*).) " 'This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality.' " (*Moran*, at p. 403.)

"Judicial discretion to set conditions of probation is further circumscribed by constitutional considerations." (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1356.) If it serves the dual purposes of fostering rehabilitation and protecting public safety (*Carbajal, supra*, 10 Cal.4th at p. 1120), "a probation condition may impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same

² As relevant here, section 6211 of the Family Code provides that " '[d]omestic violence' is abuse perpetrated against . . . [¶] . . . [¶] [a] cohabitant . . . [¶] [or] [a] person with whom the respondent is having or has had a dating or engagement relationship." (Fam. Code, § 6211, subds. (b), (c).)

degree of constitutional protection as other citizens.' " (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) This is because probation is a privilege, not a right. (*In re York* (1995) 9 Cal.4th 1133, 1150.) A probation condition that infringes on a constitutional right must be carefully tailored, relate to a compelling state interest, and be necessary to accomplish these goals. (*People v. Robinson* (1988) 199 Cal.App.3d 816, 818 (*Robinson*) [upholding probation condition requiring probationer to avoid persons with a known criminal record as reasonable and not violative of probationer's right of association]; *People v. Jungers* (2005) 127 Cal.App.4th 698, 704 (*Jungers*) [a probation condition restricting probationer's ability to contact his wife "is valid only if it is reasonably necessary to accomplish the needs of the state and is narrowly tailored to accomplish this goal"].)

"[R]estriction of the right of association is part of the nature of the criminal process." (*Robinson, supra*, 199 Cal.App.3d at p. 818.) "Sentencing courts often condition a grant of probation on the offender's agreement to avoid future contact with his or her victim." (*Moran, supra*, 1 Cal.5th at p. 404.)

"The elimination of domestic violence is a compelling state interest. The Legislature's stated purpose in enacting the Law Enforcement Response to Domestic Violence Act (§§ 13700-13731; Stats.1984, ch. 1609, § 3, p. 5713) was 'to address domestic violence as a serious crime against society and to assure the victims of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide.' (Stats.1984, ch. 1609, § 1, p. 5711.) The Legislature expressed its intent 'that the official response to cases of domestic violence shall stress the enforcement

of the laws to protect the victim and shall communicate the attitude that violent behavior in the home is criminal behavior and will not be tolerated.' (*Ibid.*)" (*Jungers, supra*, 127 Cal.App.4th at p. 704.) *Jungers* noted that "victims of domestic violence often remain in abusive relationships. [Citation.] In this regard, domestic violence statutes are meant to protect 'victims from participation or complicity in their own predicament.' " (*Id.* at p. 705, fn. 3.)

We generally review the imposition of probation conditions for an abuse of discretion; however, "[w]e review 'constitutional challenges to probation conditions de novo.' " (*People v. Trujillo* (2017) 15 Cal.App.5th 574, 586.)

B. *Analysis*

Pena does not dispute the reasonableness of the no contact probation condition under *Lent, supra*, 15 Cal.3d 481; he challenges it only on constitutional grounds. We conclude the state's compelling interests in protecting domestic violence victims and in Pena's rehabilitation justify the restrictions imposed here.

In connection with his no contest plea, Pena stipulated to the facts contained in the police report which documented him twice backhanding A.D.; pulling her by the hair; strangling her with both hands around the neck; and holding his hand over her mouth, causing her to panic because she felt she could not breathe, and preventing her from yelling for help. Police documented redness on both sides of A.D.'s neck. Despite the victim's statements and visible signs corroborating her report of abuse, Pena denied that he abused the victim—causing the probation officer to conclude Pena failed to accept responsibility for his criminal behavior. This was not Pena's first domestic violence

offense. Pena was previously convicted for domestic violence against another victim in February 2015 and was still within the three-year probationary period for that offense when this one occurred.

Under these facts involving repeated incidents of domestic violence and Pena's failure to accept full responsibility for his behavior, we find the probation condition is necessary to accomplish the state's dual goals of protecting domestic violence victims and rehabilitating offenders. (*Jungers, supra*, 127 Cal.App.4th at p. 705 [probation condition prohibiting husband from initiating contact with spouse who was also domestic violence victim upheld as narrowly drawn to promote state's interest in addressing domestic violence]; *In re Peeler* (1968) 266 Cal.App.2d 483, 492-493 (*Peeler*) [upholding probation condition, on a drug-related offense, prohibiting probationer from associating with spouse, a reported drug user, effectively requiring them to live apart]; see also *People v. Wardlow* (1991) 227 Cal.App.3d 360, 367 ["Conditions of probation prohibiting an individual from associating with other persons including spouses and close relatives, who have been involved in criminal activity have generally been upheld when reasonably related to rehabilitation or reducing future criminality."].)³

³ Heightened concerns regarding marital and parental relations are not implicated here because Pena and A.D. are not married and do not have children together. (See *Peeler, supra*, 266 Cal.App.2d at pp. 491-492 [discussing public policy regarding "the inviolability of a marriage" in the context of the imposition of probation conditions].) Although Pena argues that "Jungers and his domestic partner were not married when the probation conditions at issue were imposed," the victim in *Jungers* was the mother of the probationer's child and had married the probationer prior to seeking modification of the CPO to lift the no contact order. (*Jungers, supra*, 127 Cal.App.4th at pp. 700-701.)

We further find the probation condition is narrowly tailored to accomplish these goals. The court declined to impose a mutual no contact order, expressly noting it had no "authority over the victim's right of contact," and stating, "to restrict her ability [to contact Pena], I think is inappropriate." Further, the court limited the CPO temporally to three years, emphasized to both Pena and A.D. that each was free to seek modification of the CPO in the future, and explained to them the factors the court would consider in assessing a change in circumstance. (See *Peeler, supra*, 266 Cal.App.2d at pp. 492-493 [holding conditions of probation impinging on a couple's marital rights to be reasonable inasmuch as they were temporary]; § 1203.3, subd. (b)(6) [enumerating various factors for courts to consider in determining whether to limit or terminate a domestic violence restraining order].) We thus conclude the probation condition imposed here is narrowly tailored to promote its purposes of protecting domestic violence victims and rehabilitating offenders. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 890 ["[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad"].)

In sum, in light of the state's compelling interests to protect domestic violence victims and to rehabilitate probationers, we conclude the challenged probation condition does not violate Pena's constitutional rights because it is sufficiently narrowly tailored and reasonably related to the state's goals. (*People v. Forrest* (2015) 237 Cal.App.4th 1074, 1080 ["a probation condition is unconstitutionally overbroad if it imposes limitations on the probationer's constitutional rights and it is not closely or narrowly

tailored and reasonably related to the compelling state interest in reformation and rehabilitation"].)

Pena's arguments on appeal do not convince us otherwise.⁴ Pena contends the trial court erred because it improperly required a showing of a change in circumstance. He argues section 1203.3's requirement to find a change of circumstance did not apply because this was not a modification of a probation condition; rather, it was the first CPO issued under section 1203.097.⁵ Even if the court was not *required* to find a change in circumstance, that does not preclude the court from considering whether the circumstances then present warranted lifting the no contact order, as requested. Aside from A.D.'s request to modify the CPO, the circumstances at the time of sentencing were largely the same as when the initial CPO was issued. The sentencing court considered the circumstances—including Pena's current and prior domestic violence convictions, the probation officer's concern Pena did not take responsibility for his actions when he denied abusing the victim even after admitting the factual basis of the domestic violence charges against him, and the absence of any affirmative indication that Pena might behave differently in the future—and concluded the no contact order should remain in place. We conclude the no contact order was reasonably imposed under the

⁴ Pena states that he has "liberally adopted" the analysis and language from a previously published decision of this court that was subsequently ordered not to be officially published. As that opinion was ordered not to be published, Pena's citation and reliance on that opinion violates the California Rules of Court, which provide that an unpublished opinion "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Court, rule 8.1115(a).)

⁵ As indicated *ante*, the initial CPO was issued under section 136.2.

circumstances and therefore within the sound discretion of the sentencing court. (*Lent, supra*, 15 Cal.3d at p. 486; *Moran, supra*, 1 Cal.5th at p. 403.)

We reject Pena's argument that the no contact restriction must be lifted because A.D. does not support it, and if A.D. contacts Pena, any response from him will violate the no contact order. A.D.'s stated desire to maintain contact is not dispositive. As the court in *Jungers* recognized, the trial court was required to impose a protective order for the victim when it placed Pena on probation, "despite [the victim's] claim she did not fear for her safety." (*Jungers*, 127 Cal.App.4th at p. 705.) Section 1203.097, subdivision (a)(2) *requires* the sentencing court in a domestic violence case to impose a criminal protective order to ensure the protection of victims and authorizes the protective order to include stay-away conditions. We have already concluded the no contact order was reasonably imposed under the circumstances.

We also reject Pena's argument that the probation conditions must be modified because they have the collateral impact of restricting A.D.'s constitutional freedoms. He claims, "Respondent's position is that the CPO and probation[] conditions must also be construed to restrain [A.D.] from contacting appellant to protect her from 'complicity in her abuse.' [Citation.] If so, the [trial] court's acknowledgement that it has no authority to restrict [A.D.'s] freedom of association [citation] is a legal fiction." Pena misconstrues the Attorney General's position, which is that the trial court was justified in imposing the CPO and probation condition *on Pena* to protect his victim from contact by her abuser and also to protect her from complicity in her abuse. (See *Jungers, supra*, 127 Cal.App.4th at p. 705, fn. 3; see *People v. Gams* (1997) 52 Cal.App.4th 147, 153-154

[domestic violence statutes protect "victims from participation or complicity in their own predicament."].) The conditions imposed by the trial court do not restrict A.D.'s freedom of association—they appropriately restrict only Pena's behavior.

Finally, we reject Pena's contention that the trial court issued the CPO "erroneously based on the court's speculation that [Pena] had been required to take an anger management course when he was placed on summary probation for his prior misdemeanor domestic violence conviction."⁶ Although the court stated it "suspect[ed] that there was already a 52-week anger management course," there is no indication that this belief was the reason the court declined to remove the no contact restriction. Instead, the court properly considered all the circumstances presented—including the nature of Pena's offense, his history of domestic violence and his failure to take responsibility—and acted within its sound discretion to impose the no contact order.

⁶ There is no indication in the record that Pena's prior conviction resulted in the requirement he take an anger management course; rather, the record indicates that after the initial misdemeanor domestic abuse conviction, Pena was placed on summary probation and required to perform community work services and to pay fines and fees.

DISPOSITION

The judgment is affirmed.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.